TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1922

No. [redacted]33

NORTH CAROLINA RAILROAD COMPANY, PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX OF HUGH SCOTT LEE, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1921.

CERTIORARI AND RETURN FILED APRIL 9, 1921.

(28,115)

(28,115)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 234.

RTH CAROLINA RAILROAD COMPANY, PETITIONER,

vs.

VELYN K. LEE, ADMINISTRATRIX OF HUGH SCOTT LEE, DECEASED.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1921.

1-3 Twelfth District.

No. 389.

EVELYN K. LEE, Administratrix,

against

NORTH CAROLINA RAILROAD COMPANY.

(From Guilford.)

Before McElroy, J. Defendant Appealed.

Summons, showing service December 20, 1919, and May 27, 1919, are filed in the original transcript.

Complaint.

(Title of Cause.)

NORTH CAROLINA,
Guilford County:

In the Superior Court.

The plaintiff complaining of the defendant alleges:

1. That Hugh Scott Lee, her intestate, died in the County of Guilford on the 15th day of March, 1919, and the plaintiff, Evelyn K. Lee, and before the bringing of this action qualified as his administratrix in the County of Guilford.

2. That the defendant, The North Carolina Railroad Company, is a corporation duly created, organized and existing under the laws of the State of North Carolina, and at the time of the grievance herein complained of was the owner of a railroad bed from Charlotte through Pomona Yards and Greensboro to Goldsboro in the State of North Carolina; that before the death of the intestate of the plaintiff and the bringing of this action, the defendant leased its said road bed to the Southern Railway Company for ninety-nine years thereafter, succeeding which lease was in force at the time of the homicide set forth herein and the Southern Railway during that time was op-
4 erating the said road bed from Charlotte through Pomona Yards to Goldsboro in said State.

3. That the Southern Railway Company is a corporation duly created, organized and existing under the laws of the State of Virginia as a common carrier, and as aforesaid was operating the railroad of the defendant at the time the intestate of the plaintiff was killed as alleged herein under the lease aforesaid from the defendant.

4. That the intestate of the plaintiff at the time of his death was employed by the lessee of the defendant as a conductor at Pomona,

North Carolina, for a valuable consideration, and at the time of h death was in the performance of his duty as such officer.

5. That on the 15th day of March, 1919, the intestate of the plai tiff was operating on the Pomona Yards of the lessee of the defen ant near the town of Pomona, North Carolina, where the defenda was kicking cars from one track on to the switches connected wi the said tracks; that the intestate of the plaintiff had gone down t track some distance to give some orders about the movement of so cars, and while he was giving orders to other employes of the less of the defendant the defendant through its engineer caused a box c to be kicked down the track upon which it was operating so that would go off on to a switch; that the lessee of the defendant did n place any man upon the said box car at any particular place, but was going with great speed down the track when a brakeman unde took to get on to the car and stop it, but on account of its being near to the intestate of the plaintiff, who had his back turned towa the oncoming car, and on the account of defective brakes on the sa car, he could not stop the same, and it ran over the intestate of t plaintiff and killed him, whereby the plaintiff was made to suffer t amount of damages herein set forth.

6. That the death of the intestate of the plaintiff was caused wit out fault on his part and by the negligence of the lessee of the d fendant, in that it was engaged in the dangerous business 5 kicking cars upon the track, contrary to the laws of Nor Carolina; in that it had no brakeman or person on the sa car which was rolling down the track upon the Pomona Yards wi great speed when it ran on to the intestate plaintiff and killed hi in that the brake on the said box car was out of fix and could not worked by the lessee of the defendant; in that the defendant gave the intestate of the plaintiff no signal at the time or previous there of the kicking of the cars which killed him.

7. That it was made the duty of the lessee of the defendant to e ercise toward the plaintiff on the said occasion ordinary care, whi it failed to do and damaged the plaintiff in the sum of twenty-fi thousand dollars ($25,000.00).

Wherefore, plaintiff demands judgment against the defendant f the sum of twenty-five thousand dollars ($25,000.00) and the co of this action to be taxed by the clerk.

JOHN A. BARRINGER,
Attorney for Plaintiff.

In that the defendant gave no notice to the deceased of the mov ment of the engine and cars which killed him.

Answer.

The defendant North Carolina Railroad Company, answering t complaint of the plaintiff, says:

1. That it has no knowledge or information sufficient to form a belief as to the allegations of article one, and therefore denies the same.

2. That it is true, as alleged in article two of the complaint, that the defendant North Carolina Railroad Company is a corporation duly created, organized and existing under the laws of the State of North Carolina, and at the time of the injury and death complained of in said complaint, was the owner of the railroad bed from Charlotte to Goldsboro, N. C., and that said road before the death of plaintiff's intestate had been leased by it to the Southern Railway Company. That all other allegations contained in article two of the complaint are untrue and are denied, the facts being that said railway was being operated, maintained and controlled at the time mentioned by the Government of the United States by and through Walker D. Hines, Director General of Railroads, by virtue of the acts of Congress of the United States and the orders of the President of the United States.

3. That it is true, as alleged in article three of the complaint, that the Southern Railway Company is a corporation duly created, organized and existing under the laws of the State of Virginia, as a common carrier, but it is untrue and expressly denied that said railway company was operating the railroad of the defendant at the time the intestate of the plaintiff was killed as alleged in said article.

4. That the allegations contained in article 4 of the complaint are untrue and denied.

5. That the allegations contained in article five of the complaint are untrue and are denied.

6. That the allegations contained in article six of the complaint are untrue and denied.

7. That the allegations contained in article seven of the complaint are untrue and denied.

Wherefore, the defendant North Carolina Railroad Company prays that said action be dismissed, that it go without day and recover of the plaintiff the costs of the action, to be taxed by the clerk.

WILSON & FRAZIER,
Attorneys for Defendant, North Carolina Railroad Co.

Minute Docket Entries.

6423.

EVELYN K. LEE, Admx.,

v.

NORTH CAROLINA RAILROAD COMPANY.

Monday Morning, May 17th, 1920.

In this case the following jury was sworn and empaneled, to-wit:
J. R. Kernodle, M. A. Hoffman, G. W. Staley, A. W. Highfill,
7 S. B. Moore, Martin Causey, D. M. Stafford, M. V. Winfrey,
C. S. Lowery, B. F. Idol, Bryant Wilson, R. L. Small. The jury heretofore sworn and empaneled in answer to the issues submitted return as follows:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?
Answer. Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant?
Answer. $5,000.00.

P. A. McELROY,
Judge Presiding.

6423.

EVELYN K. LEE, Admx.,

v.

NORTH CAROLINA RAILROAD COMPANY.

Defendant in open court moves to set aside verdict against the greater weight of the evidence and for errors to be assigned, motion overruled, defendant excepts, judgment on the verdict, defendant excepts and appeals to Supreme Court, notice of appeal given in open court, further notice waived. Appeal bond fixed in the sum of $50.00. Defendant allowed 40 days to make up and serve case on appeal, plaintiff allowed 40 days thereafter to serve countercase or file exceptions.

P. A. McELROY,
Judge Presiding.

Judgment.

May Term, 1920.

This cause coming on to be heard at this term of the court, and the jury having been empaneled, who for their verdict answer the issues as follows:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?
Answer. Yes.

2. What damage, if any, is the plaintiff entitled to recover of the defendant?
Answer. $5,000.00.

It is therefore considered and adjudged by the court that the plaintiff, Evelyn K. Lee, administratrix of Hugh Scott Lee,
8 deceased, do recover of the defendant, The North Carolina Railroad Company, the sum of five thousand ($5,000.00) dollars and the cost of this action to be taxed by the clerk.

P. A. McELROY,
Judge Presiding.

Defendant's Statement of Case on Appeal to the Supreme Court.

This was a civil action, tried at the May Term, 1919, of Guilford Superior Court, and was brought by the plaintiff against the defendant, The North Carolina Railroad Company, for the alleged negligent killing of the plaintiff's intestate, on the 15th day of March, 1919, while he was engaged as a conductor in shifting cars on the Pomona Yards near the City of Greensboro, N. C.

The evidence of the plaintiff's witnesses, there being no evidence introduced by the defendant, was that the injury and death of the plaintiff's intestate occurred on the Pomona Yards, near the city of Greensboro, on the 15th day of March, 1919; that the plaintiff's intestate was run over and killed by a car, which was being shunted or shifted upon said yards; that at that time and previous thereto, to-wit: since the first day of January, 1918, the operation and control of the properties of The North Carolina Railroad and its lessee, The Southern Railway Company, including the Pomona Yards, had been taken over by the United States Railroad Administration; and that said properties were being operated under the acts of Congress and the orders of the President of the United States, by the Director General of Railroads; and that the agents and employees operating the same were employed by him and under his control; that the plaintiff's intestate, at the time of his injury and death, was employed by said Director General of Railroads, and so were the other agents and employees, whose negligence, the plaintiff alleged, was the proximate cause of her intestate's death. It was admitted by the plain-
9 tiff's counsel that neither the Southern Railway Company, the lessee of the North Carolina Railroad Company, nor the Director General of Railroads, had been made parties defendant to the action.

The counsel for the defendant in apt time asked the court to charge the jury as follows:

The evidence in this cause showing that at the time of the injury to plaintiff's intestate, which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administra-

tion, and that the plaintiff's intestate was an employee of said Uni
States Railroad Administration, and it being admitted that the
rector General of Railroads has not been made and is not a party
fendant in this action, the jury should answer the first issue No
The court declined to give this instruction. Counsel for the pla
tiff excepted to the failure of the court to give said instruction.
Exception No. 1.

Issues.

The following issues were submitted to the jury.

1. Was the plaintiff's intestate killed by the negligence of
defendant, as alleged in the complaint?

2. What damage, if any, is the plaintiff entitled to recover of
defendant?

The court charged the jury as follows:

"This action is brought by the plaintiff, gentlemen of the ju
against the North Carolina Railroad Company, and it is admitt
gentlemen of the jury, that the North Carolina Railroad Company
a corporation and that prior to the time of this grievance had b
leased by the defendant company to the Southern Railway Compa
and the defendant alleges, gentlemen, and contends that you sho
find from this evidence that prior to the time of this inj
10 the United States Government had taken over this road a
was at the time of the accident operating it as a War Measu
The law says, gentlemen of the jury, that a railroad company, s
as the North Carolina Railroad Company is, cannot lease its road a
relieve itself of responsibility, but that it is responsible for the c
duct of its lessee, in this case the Southern Railway Company. A
the law says, gentlemen of the jury, that if you should find
United States Government was operating this road at the time of t
occurrence that it was operating it in the capacity of a lessee; a
that the original company, the North Carolina Railroad Compa
would still be responsible for the acts and conduct of the governm
at the time it was operating it."

The defendant's counsel excepted to the part of the charge of
court above set out.
Exception No. 2.
The jury answered the first issue, yes, and the second issue $5,0
There was judgment as set out in the record, to the signing of s
judgment the defendant excepted.
Exception No. 3.

Assignments of Error.

The defendant assigns as error:

First Assignment of Error.

The refusal of the court to give the following instruction pray
for:

The evidence in this cause showing that at the time of the injury to the plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona Yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that
11 the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No.

Second Assignment of Error.

The giving by the court to the jury of the following portion of his charge:

The evidence of the plaintiff's witnesses, there being no evidence introduced by the defendant, was that the injury and death of the plaintiff's intestate occurred on the Pomona Yards, near the City of Greensboro, on the 15th day of March, 1919; that the plaintiff's intestate was run over and killed by a car, which was being shunted or shifted upon said yards; that at that time and previous thereto, to-wit: since the first day of January, 1918, the operation and control of the properties of the North Carolina Railroad and its lessee, the Southern Railway Company, including the Pomona Yards, had been taken over by the United States Railroad Administration; and that said properties were being operated under the acts of Congress and the orders of the President of the United States, by the Director General of Railroads; and that the agents and employees operating the same were employed by him and under his control; that the plaintiff's intestate, at the time of his injury and death, was employed as conductor, by said Director General of Railroads, and so were the other agents and employees, whose negligence, the plaintiff alleged, was the proximate cause of her intestate's death. It was admitted by the plaintiff's counsel that neither the Southern Railway Company, the lessee of the North Carolina Railroad Company, nor the Director General of Railroads had been made parties defendant to the action.

Third Assignment of Error.

The signing of the judgment as set out in the record, by the Court.

WILSON & FRAZIER,
Attorneys for Defendant, the North Carolina Railroad.

12 Service of the above statement to case on appeal accepted, this the 15th day of June, 1920.

JOHN A. BARRINGER.

(Certified by Deputy Clerk Superior Court Guilford County, August 26, 1920.)

13 *Docket Entries.*

Appeal from Superior Court Guilford County docketed 16 Se
tember 1920; case submitted to Court under Rule 12 on briefs whe
called in regular order; opinion 1 December 1920 Per Curiam A
firmed.

14 Supreme Court of North Carolina, Fall Term, 1920.

No. 389.

EVELYN K. LEE, Administratrix,

vs.

NORTH CAROLINA RAILROAD COMPANY.

Guilford County.

Judgment.

This cause came on to be argued upon the transcript of the reco
from the Superior Court Guilford County:

Upon consideration whereof, this Court is of opinion that the
is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that t
opinion of the Court be certified to the said Superior Court to t
intent that the judgment be affirmed.

And it is considered and adjudged further, that the defenda
and surety do pay the costs of the appeal in this Court incurred,
wit, the sum of Seven 85/100 ($7.85), and execution issue therefo

15 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolin
do hereby certify the foregoing to be a full, true and correct copy
the proceedings in this Court in the case entitled, Evelyn K. Le
Administratrix vs. North Carolina Railroad Company, wherein t
North Carolina Railroad Company appealed to this Court from t
Superior Court of Guilford County.

I do further certify that there was no written opinion filed.

Witness my hand and seal of said Court at office in Raleigh th
17th day of February 1921.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

16 Supreme Court of the State of North Carolina.

To the Supreme Court of the United States:

The execution of the within writ of certiorari appears by the transcript of the record heretofore filed in said cause and now on file in the office of the Clerk of the Supreme Court of the United States, and by a certified copy of a stipulation signed by the attorneys for the respective parties making said record the return to this writ, hereto attached.

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

17 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Being informed that there is now pending before you a suit in which North Carolina Railroad Company is appellant, and Evelyn K. Lee, Administratrix of Hugh Scott Lee, deceased, is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Superior Court of Guilford County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United
18 States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

19 [Endorsed:] File No. 28,115. Supreme Court of the United States, October Term, 1920. No. 758. North Carolina Railroad Company vs. Evelyn K. Lee, Administratrix, etc. Writ of Certiorari. Filed Mar. 28, 1921, in Supreme Court, North Carolina.

20 Supreme Court of the United States, October Term, 192

No. 758.

NORTH CAROLINA RAILROAD COMPANY

vs.

EVELYN K. LEE, Administratrix.

To the Clerk of the Supreme Court of North Carolina:

As counsel for plaintiff and defendant in the above entitled we hereby agree that the certified transcript of record on file i office of the Clerk of the Supreme Court of the United States tofore used in application for writ of certiorari may be taken return to the writ and may be used as the record in the further ing of the cause in the Supreme Court of the United States.

J. A. BARRINGER,
R. C. STRUDWICK,
Counsel for Plaint
WILSON & FRAZIER,
Counsel for Defenda

March 26, 1921.

21 Supreme Court of the State of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of the State of N Carolina, do hereby certify that the foregoing is a full, true and fect copy of an agreement signed by counsel for plaintiff an fendant in the case of North Carolina Railroad Company vs. E K. Lee, Administratrix now pending in the Supreme Court o United States.

Witness my hand and seal of said Supreme Court of North lina at office in Raleigh this 7th day of April, 1921.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of the
State of North Caroli

22 [Endorsed:] File No. 28,115. Supreme Court U. S. tober Term, 1920. Term No. 758. North Carolina Rai Co., Petitioner, vs. Evelyn K. Lee, Admx., etc. Writ of cert and return. Filed April 9, 1921.

TABLE OF CONTENTS.

TABLE OF CASES CITED.

U. S. STATUTES CITED.

In the Supreme Court of the United States,

October Term, 1920.

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

To Evelyn K. Lee, Administratrix, or Messrs. John A. Barringer and R. C. Strudwick, her attorneys of record:

This is to notify you that petitioner will on the fourteenth day of March, 1920, present to the Supreme Court of the United States in its court room at Washington, D. C., its motion for a writ of certiorari upon its verified petition and a copy of the entire record in this case, and a copy of the said motion and of the said petition and of the brief accompanying said petition are delivered to you herewith this.....day of February, 1921.

NORTH CAROLINA RAILROAD COMPANY,
By: S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of certiorari and brief are hereby acknowledged this.....day of February, 1921.

.....

.....

Counsel for Respondent.

In the Supreme Court of the United States,

October Term, 1920.

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Motion for Writ of Certiorari to the Supreme Court of the State of North Carolina.

Now comes the North Carolina Railroad Company, petitioner, by its counsel and moves this honorable court that it will by certiorari or other proper process directed to the Honorable Judges of the Supreme Court of the State of North Carolina require said court to certify to this court for its review and determination a certain cause in the said Supreme Court of North Carolina lately pending wherein petitioner, North Carolina Railroad Company, was appellee and the said Evelyn K. Lee, Administratrix, was appellant, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause, in said Supreme Court of North Carolina.

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

No. 7[redacted]2[redacted]33

Supreme Court of the United States,

October Term, 1920.

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Petition, Notice and Motion for Writ of Certiorari to the Supreme Court of the State of North Carolina and Brief in Support of Same.

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

In the Supreme Court of the United States,

October Term, 1920.

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

To the Honorable, the Supreme Court of the State of North Carolina:

The petition of the North Carolina Railroad Company, petitioner, respectfully shows to this Honorable Court that on May 26, 1919, the respondent, Evelyn K. Lee, Administratrix, instituted a suit against the Petitioner, the North Carolina Railroad Company, to recover damages on account of fatal injury to respondent's Intestate, which occurred near the City of Greensboro, North Carolina, on March 15, 1919, alleging that the petitioner was the owner of a certain track of railroad which was leased to the Southern Railway Company, and that the Intestate while in the employ of said lessee as a conductor met his death by reason of certain alleged acts of negligence on the part of the lessee, which are fully set out in the declaration. To this suit the petitioner answered, setting up among other things that the Railroad in question was being operated, maintained, and controlled at the time of the fatality by the Government of the United States by and through Walker D.

Hines, Director General of Railroads, under and by vi
tue of an Act of Congress of the United States and th
orders of the President of the United States, expressl
denying that the lessee was operating the railroad o
the petitioner at the time the Intestate of the Respon
dent was killed, and asked that the action be dismisse
At the trial of the cause it was proven that since th
first day of January, 1918, the operation and control o
the properties of the petitioner, the North Carolina Rai
road Company, and its lessee, the Southern Railwa
Company, had been taken over by the United State
Railroad Administration and that said properties wer
being operated under the Acts of Congress and the or
ders of the President of the United States by the Di
rector General of Railroads; that the agents and em
ployes operating the same were employed by the sai
Director General of Railroads and were under his con
trol; that at the time of his injury and death the Re
spondent's Intestate was employed by said Director Gen
eral of Railroads as were the other agents and employe
whose negligence it was alleged proximately caused hi
death. It was admitted that neither the Southern Rail
way Company, the lessee of the petitioner, nor the Di
rector General of Railroads had been made parties t
the action.

The first issue submitted was as follows:

Was the plaintiff's (respondent's) intestate killed by
the negligence of the defendant (petitioner) as alleged
in the complaint?

In apt time counsel for petitioner asked the Court to
charge the jury as follows:

> "The evidence in this cause showing that a
> the time of the injury to plaintiff's intestate
> which resulted in his death, the railroad proper
> ties, including the Pomona yards and the equip
> ment thereon, were not being operated by the

defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

The court declined to give this charge, to which action of the court due exception was taken.

Instead of giving the charge requested, the court charged the jury as follows:

"This action is brought by the plaintiff, gentlemen of the jury, against the North Carolina Railroad Company, and it is admitted, gentlemen of the jury, that the North Carolina Railroad Company is a corporation and that prior to the time of this grievance had been leased by the defendant company to the Southern Railway Company and the defendant alleges, gentlemen, and contends that you should find from this evidence that prior to the time of this injury the United States Government had taken over this road and was at the time of the accident operating it as a war measure. The law says, gentlemen of the jury, that a railroad company, such as the North Carolina Railroad Company is, cannot lease its road and relieve itself of responsibility, but that it is responsible for the conduct of its lessee, in this case the Southern Railway Company. And the law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee; and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it,"

to which counsel for petitioner duly excepted. The case

went to the jury, which returned a verdict in favor o
the respondent in the sum of $5,000.00. Counsel for pe
titioner moved to set aside the verdict as against th
evidence and for the errors assigned, which motion wa
overruled, proper exception being taken; judgment wa
entered on the verdict. Your petitioner excepted an
appealed to the Supreme Court of North Carolina, as
signing as error the various actions of the trial cour
as above set forth.

The judgment of the lower court was affirmed by th
Supreme Court of North Carolina *per curiam*.

The said Supreme Court of North Carolina is the high
est court in said state and its judgment in this cause i
a final judgment, and three months have not elapse
since the rendition of said judgment.

The petitioner by requesting the trial court to charg
the jury to answer the first issue No, and objecting t
judgment going against it on the ground that the caus
of action occurred during Government Control when th
property of the petitioner was being operated by the
United States Railroad Administration under the Act o
Congress and the orders of the President of the Unite
States, claimed a right, privilege, or immunity under
statute of the United States, and the judgment of the Su
preme Court of North Carolina was against such right
privilege or immunity.

The decision of the Supreme Court of North Caro
lina was erroneous in the following particulars:

1. In deciding that judgment could legally be rendere
against the North Carolina Railroad Company for
cause of action arising out of the operation, possessio
and control of the properties of the petitioner by the
Director General of Railroads.

2. In refusing to charge the jury as follows:

"The evidence in this cause showing that at the

time of the injury to the plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona Yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employe of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

Your petitioner furnishes as Exhibit "A" to this petition a certified copy of the entire transcript of record in this case, including the proceedings in the Supreme Court of North Carolina, to which the writ of certiorari is asked to be directed.

Petitioner asserts that by reason of the fact that it had been excluded and dispossessed from the possession and operation of its road by the paramount authority of the United States, and that the same authority had placed in possession and control of said property, the Director General of Railroads, who was operating same on the 15th day of March, 1919, it was against all law and justice to hold it liable for what it did not do.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this court directed to the Supreme Court of North Carolina sitting at Raleigh in said state, commanding the court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings in said court had in said cause to the end that this cause may be reviewed and determined by this Honorable Court as provided by Section 237 of the Judicial Code as amended and that the said judgment

of the Supreme Court of North Carolina may be reversed by this Honorable Court, and for such further relief as may seem proper and your petitioner will ever pray.

NORTH CAROLINA RAILROAD COMPANY,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel.

In the Supreme Court of the United States,

October Term, 1920.

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

CITY OF WASHINGTON,
District of Columbia:

Before me the undersigned Notary Public in and for the foregoing District and City, personally came and appeared H. O'B. Cooper, who, being duly sworn, says that he is counsel for the petitioner herein, that he knows of the proceedings had and that the facts stated in the foregoing petition are true and correct to the best of his knowledge and belief.

.....

Sworn to and subscribed before me this ..... day of February, 1921.

.....
Notary Public.

In the Supreme Court of the United States,

October Term, 1920.

No. .....

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX OF HUGH SCOTT LEE, INTESTATE, RESPONDENT

Brief of Petitioner in Support of Application for Writ of Certiorari.

This is an application for a writ of certiorari from the Supreme Court of the United States to the Supreme Court of the State of North Carolina.

STATEMENT OF THE CASE.

This was a civil action brought in the Superior Court of Guilford County, North Carolina, by Evelyn K. Lee, Administratrix, against the North Carolina Railroad Company, to recover damages alleged to have been sustained through the death of her intestate, Hugh Scott Lee, on the 15th day of March, 1919, while engaged as a conductor, near the city of Greensboro, North Carolina.

In the answer filed in this cause by the petitioner, it was alleged "that said railway was being operated, main-

tained and controlled at the time mentioned, by the government of the United States, by and through Walker D. Hines, Director General of Railroads, by virtue of the Acts of Congress of the United States and the orders of the President of the United States." Also: "It is untrue and expressly denied that said railway company was operating the railroad of the defendant at the time the intestate of the plaintiff was killed." And thereupon, it was asked that the defendant be dismissed from said cause.

The evidence in brief of the plaintiff's witnesses—there being no evidence introduced by the defendant—was that the injury and death of plaintiff's intestate occurred at the time and at the place mentioned; that his death was due to the shunting or shifting of cars; and that at the time of the fatality and previous thereto since January 1, 1918, the operation, possession and control of the properties of the North Carolina Railroad Company and its lessee, the Southern Railway Company, had been taken over by the United States Railroad Administration; that the said properties were being operated by the Director General of Railroads under the Acts of Congress and the orders of the President of the United States; that the agents and employees operating said properties—including plaintiff's intestate and the other agents and employees whose negligence it was alleged proximately caused her intestate's death—were employed by said Director of Railroads and were under his control. It was admitted that neither the Southern Railway Company, the lessee of the North Carolina Railroad Company, nor the Director General of Railroads, had been made parties to the action.

Counsel for the defendant asked the court to charge the jury as follows:

"The evidence in this cause showing that at the

time of the injury to plaintiff's intestate, which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

This the court declined to do, but charged the jury as follows:

"This action is brought by the plaintiff, gentlemen of the jury, against the North Carolina Railroad Company, and it is admitted, gentlemen of the jury, that the North Carolina Railroad Company is a corporation and that prior to the time of this grievance had been leased by the defendant company to the Southern Railway Company and the defendant alleges, gentlemen, and contends that you should find from this evidence that prior to the time of this injury the United States Government had taken over this road and was at the time of the accident operating it as a war measure. The law says, gentlemen of the jury, that a railroad company, such as the North Carolina Railroad Company is, cannot lease its road and relieve itself of responsibility, but that it is responsible for the conduct of its lessee, in this case the Southern Railway Company. And the law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee; and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it."

Due exceptions were taken to these actions of the court, and the case was submitted to the jury to answer the following issues:

First.—Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?

The jury answered to this issue, "Yes."

Second.—What damage, if any, is the plaintiff entitled to recover of the defendant?

The jury answered to this issue, "$5,000.00."

The defendant then moved to set aside the verdict as against the evidence, and for the errors assigned in refusing to charge the jury as requested and in charging the jury as above set forth. These motions were overruled, the defendant excepted, and judgment was entered on the verdict. The defendant excepted and the case was taken to the Supreme Court of North Carolina, where the following errors were assigned:

The first assignment of error was the refusal of the court to give the instruction asked:

> "The evidence in this cause showing that at the time of the injury to the plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona Yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

Error was also assigned to the action of the Court in signing the judgment as set out in the record.

THE QUESTION PRESENTED.

This record presents a single question: Is a corporation which owns a railroad system, liable in damages on a claim arising out of the operation of said railroad by the employees and servants of the Director General of Railroads who is in exclusive possession, control and operation of such railroad under and by virtue of a statute of the United States and an order of the President of the United States, made pursuant thereto?

FEDERAL QUESTION PRESENTED.

This question involves the legal operation and effect of the statutes and the Constitution of the United States, and the order of the President made pursuant thereto, and, therefore, presents a Federal question, which parties with rights involved, are entitled to have examined and decided when brought to this court in a proper way.

A petition has been filed in this court, asking that a writ of certiorari be issued to the Supreme Court of North Carolina. Section 237 of the Judicial Code, as amended, provides that this court may, by certiorari, cause to be certified to it for review from the highest court of a state, any cause "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" the same.

After the resolutions by Congress declaring a state of war to exist between the United States and the two Central Empires, respectively, Congress, in the "Act making appropriations for the support of the army for the fiscal year ending June 30, 1917," approved August 29, 1916 (39 Stat. 645, c. 418 [Comp. St. 1918, Sec. 1974a], declared (section 1):

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Thereafter, on December 26, 1917, the President issued his proclamation, wherein, referring to such resolutions, and the act of Congress aforesaid, and the necessity for the exercise by him of the powers thereby conferred, it is, among other provisions not here material, declared:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation. * * * and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and

of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads."

The proclamation further provides:

"Except for the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine." Comp. St. 1918, Section 1974a.

Thereafter Congress passed the act commonly designated the "Federal Control Act," approved March 21, 1918 (40 Stat. 451, c. 25 [Comp. St. 1918, Sections 3115¾a to 3115¾p]), whereby an elaborate system is prescribed for the possession, operation, and management under the President of the United States, of the transportation systems thus authorized to be taken. So far as here pertinent, it authorized the President, through contract with the owners, to provide for their just compensation for the use of the properties so taken, and that any income derived from their operation in excess of such just compensation "shall remain the property of the United States," for the adjustment and payment as between the government and the owners of all taxes assessed against the property while so operated, for the right of the President to make betterments, extensions, and additions to any system, and the manner

of financing the same, and for taking care of renewals, maintenance, repairs and depreciation thereon, with authority in the President to prescribe "all other reasonable provisions," not inconsistent with the legislative authority conferred upon him "that he may deem necessary or proper for such federal control or for the determination of the mutual rights and obligations of the parties." It empowers the President to initiate rates of fares, freights, and charges, and to fix the compensation of all persons employed in carrying on the operation of such transportation systems under federal control, and it appropriates the sum of $500,000,000 "together with any funds available from any operating income," to be used by the President "as a revolving fund for the purpose of paying the expenses of the federal control and other purposes connected therewith." It provides:

> "Section 8. That the President may execute any of the powers herein * * * granted him with relation to federal control through such agencies as he may determine."
>
> "Section 9. That the provisions of the act of 1917, first above mentioned, 'shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred.'"
>
> "Section 10: That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no

defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control."

"Section 12: That moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States."

And finally (Section 16), it is provided:

"That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war."

After the passage of this act, the President, on March 29, 1918, issued his further proclamation wherein, referring thereto, he declares:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or * * * in the name of the President to" exercise all the powers conferred by the act upon the President, "and to issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

Thereafter, on October 28, 1918 (Comp. St. 1918, Section 3115¾h), the Director General, in the administra-

tion of such federal control, issued his "General Order No. 50," whereby, so far as here pertinent, it was provided:

> "Whereas, the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state of federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control, or with any order of the President'; and
>
> "Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising under federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the said Director General of Railroads and not against said corporation:
>
> "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures. * * *
>
> "The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pend-

> ing against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The petitioner, having claimed immunity from liability under the acts, orders, etc., above set forth, and the Supreme Court of North Carolina having decided against such immunity and afirmed a verdict of $5,000 against it, the petition presents a federal question for review and determination by this Honorable Court.

RAILROAD COMPANY NOT LIABLE ON CAUSES OF ACTION ARISING DURING FEDERAL CONTROL.

The principle of law which makes a railroad company liable for the negligent acts of its employees is that of *respondeat superior*. The responsibility of the employer or master for the negligence of his servant, is based on no other ground. Under this doctrine, the test of liability is: Does the master control the servant?

In *Brady vs. Chicago, etc., R. Co.*, 114 Fed. 100, this doctrine is stated thus:

> "If the master cannot command the alleged servant, then the acts of the latter are not his and he is not responsible for them. If the principal cannot control and direct the alleged servant, then he is not his agent and the principal is not liable for his acts or omissions. In such case, the maxim *respondeat superior*, has no application because there is no superior to respond. In an action against an alleged master or principal for the act

> of his alleged servant or agent, under the maxim, *respondeat superior*, there can be no recovery, in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer."

This case was cited in the case of *Mardis* vs. *Hines, Director General,* 258 Fed., 945. In this case, the injury sued for was sustained on January 26, 1918, after the Director General assumed control of the railroad, and the suit was brought on January 21, 1919, after the Director General issued his General Order No. 50. The court sustained the demurrer of the railroad company, which had been sued jointly with the Director General, giving the following reasons:

> "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The Railroad Company has nothing to do with such operation. When the Director General assumed control all the employes on the railroad ceased to be employes of the railroad company and became employes of the Director General. At that time the relation of master and servant ceased to exist between the employes operating the railroad and the railroad company. That relation then began and still exists between such employes and the Director General."

The rights of the Director General under the act of Congress and the proclamation of the President, were conclusively established by this Honorable Court in the case of *Northern Pacific Railroad Co.* vs. *North Dakota,* 250 U. S., 135, in which was attacked an order of the Di-

rector General establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate as well as interstate. Mr. Chief Justice White, in delivering the opinion of the court, says:

> "No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership heretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it."

The *North Dakota Case, supra,* was cited and followed in the case of *Hatcher & Snyder vs. Atchison, etc., Ry. Co.,* 258 Fed. 952. After using the above quotation from the opinion of Mr. Chief Justice White, the court says:

> "And we know, as a matter of public information, that the construction there given as to what

was intended by Congress should be done has in fact been done. The railroad companies have been entirely excluded from participation in the operation of their properties. They receive none of the income from them. It goes to the Government. They have no voice in the employment and discharge of men engaged in the upkeep and repair of their roads and rolling stock, and the operation of trains. All of their properties, of every kind, needful for transportation purposes have been taken over by the Government, and their possession and operation rest in the exclusive control of the Director General."

"The only authority for suing a carrier while under federal control must be rested upon the act of Congress which subjects them 'to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law,' with certain exceptions, and provides that:

> "'Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law,' etc. U. S. Comp. Stat. 1918, pp. 456-458.

"And the validity of this statute is sustainable on no other theory than that the transportation companies are operating their respective systems under federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employes of the federal government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law."

Vaughn vs. State, 81 So., 417, 426.

In Haubert vs. B. & O. R. R. Co. and Director General

of Railroads, 259 Fed., 361, the defendant railroad company demurred, contending that the cause of action having arisen during Federal control, the railroad company could not be held liable. The court sustained the demurrer, using the following language:

> "Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another. Liabilities thus arising during federal control it must be conceded, are in substance debts of the United States, notwithstanding, for purposes of administration, the control and operation of the railroads have been vested in an official called the Director General of Railroads."

In discussing Section 10 of the Control Act, which provides that carriers while under Federal control shall be subject to all the laws and liabilities, except so far as may be inconsistent with the provisions of that act, or with any orders of the President, the court says:

> "If the words 'common carriers' mean the railway companies themselves, as distinguished from the agency provided by the act for operating the railway lines, it is none the less true that they are made subject only to such liabilities as are not inconsistent with the provisions of the act itself. It may be consistent to subject the railway companies to liabilities created by themselves or existing before being ousted from the possession and control of the property; it would be inconsistent with all the provisions of the act to subject them to liabilities for the acts and conduct of public

agents operating their property under federal control. It follows that the provisions of this section do not impose a liability upon the railway companies for acts of the Director General of Railroads and his agents, because so to do would be inconsistent with the provisions of this act."

In a suit against a railway company for a cause of action arising during Federal control, a motion was made to substitute the Director General of Railroads, under General Order No. 50, and that the defendant corporation be dismissed. The grounds alleged for the motion were that since the proclamation of the President, the possession, control and operation of the property was in and by the United States Railroad Administration, through the Director General, and that the corporation was not at the time in the possession, control or operation of the same.

The court granted the motion, saying in part:

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the government. Such a taking involved in no sense the element of agency by the government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of such taking was necessarily to

relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation, and quite as necessarily an assumption of such responsibility by the government. And this, as is clearly shown by the whole framework of the act, was what Congress desired to accomplish. The conditions to be met in the emergency presented were deemed such that the administration of this vital instrumentality for successfully carrying on the war was to be freed for the time from any hazard arising through a divided control or responsibility. And as Congress could not in the nature of things foresee the many exigencies and necessities that might arise from prompt, free, and unrestrained action by the executive, in the practical administration of this great trust, the President was clothed with the broadest and most plenary powers and authority to deal with the problems as they might arise and in such manner as his judgment should dictate; and this not only as between the government and the owners, but as between the government and the general public, with express power to make all orders and regulations essential to carrying out the purpose of Congress."

* * * * *

"I am therefore of opinion that this order was well within the power of the Director General as the representative of the President. And certainly it was both a wise and expedient thing, and in the interest of the proper and orderly administration of justice, to direct that the defense in actions and proceedings for causes arising under government administration and for which the latter, as we shall see, was alone answerable, should be in the name and under the direction and control of the government's representative. Indeed, it is doubtful if any judgment binding upon the government could be obtained, in an action so arising, to which its representative was not made a party."

Nash vs. Southern Pacific Co., 260 Fed., 280.

One of the earliest reported cases construing the validity of General Order No. 50, was *Rutherford vs. Union Pacific R. Co.*, 254 Fed. 880. Sustaining a motion of the defendant company to substitute the Director General of Railroads under this order, and construing the word "carrier" in the act, to mean "Director General," the court reaches its conclusion in the following language:

> "The question involved is the proper meaning of the word 'carriers' as used in this statute. Before the enactment of this statute the President by his proclamation of December 26, 1917, had taken possession and control of the railroads of the United States, acting under the authority granted to him by the act of Congress approved August 29, 1916 (39 Stat. 645, c. 418, Section 1 [Comp. St. 1918, Section 1974a]). The proclamation had directed that this possession, control and operation should continue to be exercised by William G. McAdoo, as Director General of Railroads, and unless he should otherwise provide by order, that the board of directors, receivers, officers, and employes should continue the operation of the railroads in the names of their respective companies. From and after the taking of possession of the railroads by the President, the corporations or persons who had previously controlled them ceased their functions and obligations as carriers. While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employes, who retained their positions and conducted the details of operation, were the acts of the Director General. The part of section 10 of the act of March 21, 1918, on which the plaintiff relies, did not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against 'such carriers,' and this referred to the 'carriers while under federal control' mentioned in the first part of the section. It would have been an anomaly to have given the

actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President who is operating the railroads. The language is:

> " 'And in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government.'

"The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated.

"Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported, (*United States vs. Nixon*, 235 U. S., 231, 234, 35 Sup. Ct. 49, 59 L. Ed. 207; *United States vs. Ramsey*, 197 Fed. 144, 146, 116 C. C. A. 568, 42 L. R. A. [N. S.] 1031), and the office of the Director General is analogous to that of a receiver of the railway companies.

"By the acts of Congress, the President was given authority to exercise the control of the railroads by such agencies as he should determine. He may appoint one or many persons, or one or many partnerships or corporations to carry out his will and to perform the business of carriage of goods and passengers over the several railroads. The purpose of Congress in the giving the right to bring suits against the carriers was to

give the right of suit by or against any of such agencies as should be engaged in the actual control of the operations of the railroad after the President assumed control. The order of the Director General therefore does not conflict with the language of this statute, but is pursuant to and in execution of it, and was authorized by the power conferred on him."

In *Westbrook vs. Director General,* 263 Fed. 211, on motion to remand to the state court, the court gave the following construction of section 10 of the Control Act:

"By the term 'carriers while under federal control' is here meant the United States as operator of each several railroad. The word 'carrier' most often in the act refers to the transportation companies mentioned in its title as 'owners.' Such must be its meaning in the provisions relating to the agreements to be made between the government and the companies, and to division of taxes and other matters. But Congress itself, in the opening sentence of the act, declared that 'carriers' was to be used as the equivalent of 'railroads and transportation systems.' Yet it must be in the popular sense in which one uses the word 'railroad' in such expressions as 'suing the railroad,' 'working for the railroad,' 'the railroads are active in politics,' where by a metonymy the name of the physical thing is used for its controller, whether corporation, receiver, or government. The term 'railroads' might have been used in this loose sense anywhere in the act, instead of 'carriers,' except that water transportation was also intended to be covered.

"In section 10, however, aside from the question of *power* to make its enactments as applied to the owning corporations, there was certainly no *necessity* for declaring that *they* should remain under the laws as formerly and subject to the same statutes, for they would naturally so remain as to all matters for which they were liable; not

for denying to them the right to defend as instrumentalities of the government, for they *were not such;* nor could any enlarged right to remove their suits be supposed to exist for the reason that the government had taken their property and was operating it. The denial of the right to levy was a sufficient protection, if not the limit of Congressional authority as to suits against these corporations on their liabilities. But as applied to the governmental operation of the transportation systems every provision becomes a code. The first sentence, declaring that the carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, state, federal, or at common law, created a liability on the part of the United States for every act and omission for which liability had formerly attached to the owners in their business as common carriers. The reserved right to alter these by orders of the President was a power to quickly withdraw this liability to any extent found to be needful. Thus Congress made the railroads' liabilities to patrons, employees, and the public arising under federal control to be 'claims against the United States.'

* * * * * * *

"The provisions of section 10 will not be held intended to apply to the owning companies, because so applied the legislation would be not only unreasonable but probably unconstitutional. Taken to mean the government in its operation of the several railroads, it is intelligible, within the powers of Congress, accomplishes justice and the apparent intention of Congress, and accords with the executive construction of the Director General in the contracts made with the companies for their compensation, wherein he assumed all such liabilities, as well as in his orders of which 50 and 50a are examples."

Erie Railroad Co. vs. Caldwell, 264 Fed., 947, was a suit against the company and the Director General for damages for personal injuries occurring to the plaintiff during federal control. At the trial, the defendant company moved for the direction of a verdict in its favor for the reason that under the Control Act and the Proclamation of the President, its property and transportation system were vested in the Director General of Railroads, who was then operating the same, which motion was overruled. This action of the District Court was held error by the Circuit Court of Appeals, upon the authority of the *North Dakota case, supra,* the court saying:

> "The Director General of Railroads having lawfully taken full possession and control of this company's property, the company itself could not be held liable for negligence resulting in injury to employees or others during the time its property was being operated by governmental agencies over which it had no control."

Baker vs. Bell, (Tex.) 219 S. W., 245, was an action by an employee for injuries on a railroad under federal control. In overruling the action of the lower court in denying a motion to dismiss the railroad, so that the case could be prosecuted against the Director General alone, under Order No. 50, the court says:

> "As the alleged injuries were committed after the property was taken from the receiver, and he had nothing whatever to do with its operation, instrumentalities, the service or the employment of the servants, it would be rather strange under such circumstances to call the receiver the master and apply to him the doctrine of respondent superior.
>
> "No court has ever questioned, under the acts of Congress, the power of government, during the

time of war and the necessity therefor, to sequester the railroads or any property as a war measure and operate them. Nor, so far as we know, has there been any formidable protest coming from the owners. There was a great international war going on over the seas, calling for the highest type of patriotism and Americanism—a call to arms and to the rescue and for help to save to the world that liberty, religious and civil, for which our forefathers fought and shed their blood, and there was none to deny the government anything. It took over these roads, through its Director General, by the virtue of the acts of Congress and the President's proclamation, and hence became the master, and those operating the roads were completely displaced of its physical properties, together with all the servants, operatives, etc. The receiver was thus left without the means of defense that he would have had, had he been operating the road himself. He had no right of inspection, of spending money for repairs, or command of the men; no reports from employes as to condition of rolling stock; no corps of attorneys to defend or prosecute suits, or the right to secure the witnesses and obtain necessary information from them. These powers usual to railroads had all been taken away. The relation of master and servant had passed from the receiver to the Director General.

"We believe the motion should have been granted, and we sustain this assignment."

Other cases, denying the right to recover in similar cases against the railroad companies, and upholding the validity of General Orders Nos. 50 and 50a of the Director General, are:

Robinson vs. Central of Georgia Ry. (Ga.), 102 S. E., 532.

Hines, Director General, vs. Zellmer (Ga.), 103 S. E., 97.

Peacock vs. Detroit, etc., Ry. Co. (Mich.), 175 N. W., 580.

Cravens vs. Hines, Director General (Mo.), 218 S. W., 912.

Sagona vs. Pullman Co., 174 N. Y. Supp., 536.

Grant vs. Director General, (S. C.) 102 S. E., 854.

Castle vs. Southern Railway Co., (S. C.), 99 S. E., 846.

Houston, etc., R. Co. vs. Long, (Tex.), 219 S. W., 212.

Galveston, etc., Ry. Co. vs. Wurzbach, (Tex.), 219 S. W., 252.

PROVISIONS IN TRANSPORTATION ACT SUPPORT OUR CONTENTIONS.

The contention presented by us that it was not the intention of Congress in passing the Railroad Control Act to make the carrier corporations owning the various properties taken over by the Government liable in damages for causes of action that might arise by reason of their operation during the period of federal control, is supported by the provisions of the Transportation Act of 1920.

Thus it is provided for the prosecution of such causes:

> "Sec. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the President of the Railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control be brought against an agent designated by the President for such purpose, which

agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. (41 Stat. L., 461.)

Then follows the provision for the payment of judgments in such actions:

> "Sec. 206. (e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210." (41 Stat. L., 461.)

Then comes the following provision giving immunity to the carrier corporation from levy to satisfy any such judgment:

> "Sec. 206. (g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control." (41 Stat. L., 461.)

This clearly shows that it was not the intention of Congress to let the carrier corporation be subjected to any liability whatever for a cause of action such as the present one. The attention of this court is respectfully called to the anomalous condition in which this plaintiff would be if this court should affirm the judgment of the Su-

preme Court of North Carolina. He would have to all intents and purposes a judgment against the North Carolina Railroad Company but which he would be powerless to enforce by reason of the provisions of the Transportation Act above set forth.

RULE OF LESSOR AND LESSEE NOT APPLICABLE.

In the Supreme Court of North Carolina respondent's counsel relied upon the case of Clements vs. Southern Railway Company, 179 N. C., 225, wherein the court said: "Therefore, the attitude of the parties is that of lessor and lessee, and the defendant company is liable to be sued jointly with the Director General, representing the lessee."

It is confidently asserted that this statement of the Supreme Court of North Carolina is in error. In order to create the relationship of lessor and lessee there must be a contractual relationship growing out of an agreement, offer, or willingness on the part of the owner of property to transfer its possession to that of another for the purposes of its use and control. Such are not the facts here. The relationship of lessor and lessee did exist and exists between the petitioner and the Southern Railway Company. There is no relationship of any kind whatsoever between the petitioner and the Director General of Railroads. Your petitioner is not named as one of the roads taken over for Government operation during the war period. So far as these purposes are concerned it is not known to the Federal Government. None of its properties were taken from it because its properties at the time were in the possession and control of its lessee, the Southern Railway Company, from whom they were taken by the paramount authority of the United States without its consent and against its will; so, it is respectfully

urged and submitted that it was clear error on the part of the Supreme Court of North Carolina to hold that the relationship of lessor and lessee existed between the petitioner and the Director General, and that, therefore the Clements case, *supra*, is not in point.

TO HOLD YOUR PETITIONER LIABLE WOULD BE TAKING ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

We go so far as to say that if the Federal Control Act permits a suit to be brought against the North Carolina Railroad Company for acts performed by the Government's agents, when the carrier's property has been taken over by a paramount authority, then such law is unconstitutional. It would be a deprivation of its property without due process of law in violation of the Constitution of the United States and of the State of North Carolina.

This judgment is not a bar to a proper suit against the Director General of Railroads, and to let it stand may result in two recoveries for the one cause of action.

This is not a case of voluntary leasing, under which lessor and lessee both or either may be sued. It is an involuntary taking of North Carolina Railroad Company's property by a paramount authority, namely, the United States Government, and to hold the railroad corporation liable for the acts and defaults of the servants, agents and employees of the Government in possession of the railroad is contrary to law.

The Control Act was held unconstitutional in the case of *Schumacher vs. Pa. R. R. Co.*, 175 N. Y. Supp., 84. This was an action for the death of an employee occurring while the Federal Government was operating the defendant's railroad, pursuant to the act of Congress and the proclamation of the President. The defendant company, by its answer, alleged that at the time of the acci-

dent, its railroad had been taken over by the Federal Government, and at the time, was under its control and operation and not that of the defendant, and that it was not legally responsible for the accident. These facts were proved at the trial. The court held the act unconstitutional, and that the railroad company was not liable thereunder.

> "We can reach no other conclusion than that in that respect Congress has exceeded its constitutional powers. It is repugnant to the great underlying principles of our jurisprudence, and violates, we think, the express provisions of the Fifth Amendment to the federal Constitution, declaring:
>
> " 'No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.'
>
> "Certainly the taking of the property of a corporation to pay the debt or liability of the government, for which the corporation is in no way responsible, violates this provision of the Constitution, and deprives it of the equal protection of the law.
>
> "It probably was the intention of the framers of the statute that the government should ultimately pay all such demands as in justice and by right it should. It is impossible to believe that the contrary was in their minds, but the statute nowhere so provides. If the carrier were compelled to pay the judgment thus sought to be entered, it would undoubtedly have a just demand against the government to be reimbursed for moneys so paid but the fact that such a demand exists in no way cures the statute of the infirmity of unconstitutionality. The taking of the property of one to pay the debt of another is none the less illegal, even though the party wronged may assert his right for compensation. The condemnation is against the illegal taking, and the violation of this constitutional guaranty is not cured by the possibility of future restitution."

CONCLUSION.

The above cited authorities seem to establish beyond a doubt that under the act of Congress, the proclamation of the President and the orders of the Director General made pursuant thereto, the properties of the petitioner were, at the time of the fatality which is the basis of the present suit, in the exclusive possession, operation and control of the United States; and that your petitioner had not the slightest connection therewith; that this possession, operation and control was under the paramount authority of the United States; and that there is no foundation in law or in fact for a holding that your petitioner is responsible for any judgment recovered against it, growing out of such operation and control.

Therefore, we respectfully submit that the petitioner is entitled to have a writ of certiorari from this court to the Supreme Court of North Carolina, to bring the record here, and that, upon being brought here, the judgment of the lower court should be reversed and dismissed.

Respectfully submitted,

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. [redacted]33

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

EVELYN K. LEE, ADMINISTRATRIX,
Respondent.

REPLY BRIEF FOR PETITIONER.

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

PRESS OF THE BYRON S. ADAMS PRINTING COMPANY, WASHINGTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 234.

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

EVELYN K. LEE, ADMINISTRATRIX,
Respondent.

REPLY BRIEF FOR PETITIONER.

Pages 2 and 3 of Respondent's brief contain statements of fact not in the case below and not in the record here. There is no reference in the entire record to any lease from North Carolina Railroad to the Richmond & Danville Railroad. The record (p. 1) states the North Carolina Railroad leased its said road to the Southern Railway for ninety-nine years. This is admitted in the answer. There is not a word in the record as

to the maintenance of the corporate existence of the North Carolina Railroad; not a word as to what functions the North Carolina Railroad has continued to perform; not a word as to whether or not the North Carolina Railroad has exercised the functions of a common carrier; not a word as to whether the engines, cars, rails, etc., delivered to its lessee have been worn out, and not a word as to whether or not on December 26, 1917, it had any physical properties or equipment.

Respondent, on page 3 of her brief, says:

> "It is for this reason no doubt that possession of it was never taken and control of it was never assumed by the Director General of Railroads. Its name is not included in the list of 165 carriers or systems of transportation which were taken over by him and which is referred to by this court in the case of 'Missouri, etc. vs. Ault, 256 U. S. .....' "

If Respondent means to say that possession of the North Carolina Railroad *corporation* was not taken, that is correct. If it is meant that the physical property, equipment, and appurtenances were not taken, that is not correct. The record (p. 3) shows:

> "* * * that said railway was being operated, maintained and controlled at the time mentioned by the Government of the United States by and through Walker D. Hines, Director General of Railroads, by virtue of the acts of Congress of the United States and the orders of the President of the United States."

In addition to this, in "Defendant's Statement of Case on Appeal to the Supreme Court" of North Carolina, the following facts are stated:

> "* * * that at that time and previous thereto, to-wit: since the first day of January, 1918, the operation and control of the properties of The North Carolina Railroad and its lessee, The Southern Railway Company, including the Pomona Yards, had been taken over by the United States Railroad Administration; and that said properties were being operated under the acts of Congress and the orders of the President of the United States, by the Director General of Railroads; and that the agents and employees operating the same were employed by him and under his control; that the plaintiff's intestate, at the time of his injury and death, was employed by said Director General of Railroads, and so were the other agents and employees, whose negligence, the plaintiff alleged, was the proximate cause of her intestate's death."

To support the contention that possession was not taken of the railroad of the North Carolina Railroad Company, Respondent quotes from Petitioner's brief (Rec., p. 5), where it is said:

> "There is no relationship of any kind whatsoever between the Petitioner and the Director General of Railroads. Your Petitioner is not named as one of the roads taken over for government operation during the war period. So far as these parties are concerned it is not known to the Federal government. None of its properties were taken from it because its properties at the time were in possession and

control of its lessee, the Southern Railway Company."

This is a correct quotation from Petitioner's brief, but an entirely erroneous impression is made by not quoting more fully from the brief or stating the connection in which the words were advisedly used. The Respondent had contended in the lower state court that the relationship of lessor and lessee existed between the North Carolina Railroad Company and the Government of the United States, and the lower court had so charged (Rec., p. 5). It was in answer to this contention, and under sub-heading, "Rule of Lessor and Lessee Not Applicable," that Petitioner used the language quoted. It reiterates the correctness of its statements and all its conclusions therefrom. The relationship of lessor and lessee must be a contractual relationship. There was nothing in the record or in the facts to show a contractual relationship of any kind between the North Carolina Railroad Company and the Government of the United States.

Respondent argues on page 9 of brief that the refusal of the Court to give the charge set out as Assignment of Error No. 1 (Rec., p. 7) is not error. The charge is as follows:

> "The evidence in this cause showing that at the time of the injury to the plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona Yards and the equipment thereon, were not being

operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

Respondent says "if this request contained an assumption or assertion that such properties belonged to defendant, then such assumption or assertion was notoriously contrary to the facts," etc. (Res. brief, p. 9). The charge speaks for itself. It says the railroad properties, including Pomona Yard, the place of the accident (Rec., p. 2) was being operated by the United States Railroad Administration. The record so shows (Rec., p. 5). They were the railroad properties which plaintiff in her complaint had said were leased to Southern Railway Company (Rec., pp. 1 and 2).

Respondent, while conceding that under the Ault Case, 256 U. S. ...., there would be no liability on the part of the Southern Railway Company *corporation* if the cause of action had arisen on its own properties, yet contends that because it arose on the properties of the North Carolina Railroad Company *corporation,* which were under lease to the Southern Railway Company, there would be liability. This is indeed a strange argument. It is to say that if the accident had happened under identical facts a few miles distant

on the tracks owned by the Southern Railway Company *corporation,* there would be no liability; yet, because it happened where it did, on property in the possession of the Southern Railway Company but owned by another corporation, to-wit, the North Carolina Railroad Company, then there would be liability in this case. Surely this court is not going to follow such fallacious reasoning. The Southern Railway Company, that is, the corporate entity, the *corporation itself,* was not taken over by the Government; and, under the existing law, it is not liable to the respondent, yet she contends that the North Carolina Railroad Company, the *corporation,* which likewise was not taken over, is liable for the acts of the Director General of Railroads in operating the properties owned and in the possession of the Southern Railway Company under lease. The Ault case *supra* is clearly decisive of this question. Mr. Justice Clark distinctly reaffirmed the doctrine of that case in delivering the opinion of this court in the case of Dahn v. Davis, Agent, No. 166, October Term, 1921, opinion rendered April 10, 1922, in the following language:

> "It was definitely held in Missouri Pacific Railroad Company v. Ault, Supreme Court Reporter, Volume 41, p. 593, that, at all of the times herein involved, section 10 of the Federal Control Act permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating

such road might have been sued, and that recovery, if any, would be from the United States.

"Thus, plainly the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States."

We are not sure we follow plaintiff on p. 10 of her brief, but, as we understand the contention, it is, since the North Carolina Court has held the North Carolina Railroad liable for damages arising from negligence of its lessee, Southern Railway, it was not error for the Court to hold the North Carolina Railroad liable for the negligence of the servants and agents of the Director General of Railroads, who had taken possession of the property under the Acts of Congress.

That is the meat of the case. We say that, under the Ault Case and others, the North Carolina Railroad corporation can not be held liable for the negligence of the agents of the Director General causing the death of an employee of the Director General. If we are right, the case should be reversed.

The North Carolina Railroad Company is held liable in the case of Logan vs. Railroad, 116 N. C., 940, because:

"A railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either."

The basis of liability in that case is that because the North Carolina Railroad leased its property to Southern Railway Company the relationship of lessor and lessee existed. In this case there is no such relationship, and, therefore, no liability on the part of the North Carolina Railroad for the acts of the government's agents; but, if such relationship existed it can only be found by a construction of the Federal Control Act of Congress. The Court erred in construing said Act of Congress as creating such relationship, and that error deprived the North Carolina Railroad of a right of exemption from liability secured under said Congressional Act.

Respondent says the ruling did not deprive Petitioner of any right, privilege or immunity, because, it is said, the North Carolina Railroad is not within its provisions. In arguing this, counsel again, inadvertently no doubt, goes out of and contrary to the record and says no physical property or equipment of defendant was taken over (Res. brief, p. 14). The railroad was taken over. Be this as it may, the Federal Control Act had to be and was construed by the lower court and construed wrong. Defendant is entitled under that Act to be held harmless for acts of governmental agents.

Respectfully submitted,

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921

No. 233

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Brief for Respondent

JOHN A. BARRINGER,
R. C. STRUDWICK,
Counsel for Respondent.

HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921

No. 234

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Brief for Respondent

STATEMENT OF THE CASE

This action was begun May 26, 1919, by Evelyn K. Lee, widow and administratrix of Hugh Scott Lee, against the North Carolina Railroad Company, in the Superior Court of Guilford County, in that State, to recover damages for the alleged negligent killing of her husband on March 15, 1919, by defendant.

The North Carolina Railroad Company is a corporation chartered in 1849 by the Legislature of that State, and its roadbed and track lie wholly within its limits. On September 11, 1871, the Rich-

mond & Danville Railroad Company, a Virginia corporation, came into the possession and control of the track, roadbed, engines, locomotives, coaches, etc., belonging to the said North Carolina Railroad Company, and to the rights, franchises and other property of said company, under a lease for the term of thirty years then made between said corporations. *State vs. Railroad,* 73 N. C., 527 (528). In said lease it was covenanted that the lessor would not interfere with the use and operation of said railroad properties by the lessee. *Hill vs. Railroad,* 143 N. C., 539 (570).

In the year 1895 the North Carolina Railroad Company executed to the Southern Railway Co., a Virginia corporation, successor in interest of its former lessee, a lease containing provisions similar to those in the first lease for a term of ninety-nine years. Since 1871 the North Carolina Railroad Company has maintained a corporate existence; but its only function has been to receive and disburse as dividends to its stockholders the money paid to it as rental by its lessees. It has not been a common carrier, as this term is ordinarily understood, since 1871, nor has it since that date exercised any of the functions of a common carrier or been engaged in that business. It may safely be said that all the engines, cars, coaches and other equipment which, in 1871, were delivered to its lessee, and even the rails and crossties then upon its roadbed, have long since been worn out and consigned to the scrap heap. It was not as a matter of fact on December 26, 1917, when the President,

pursuant to the Act of Congress, took possession and assumed control of said railroads, a system of transportation or carrier; it had then no physical properties or equipment and had not had for many years, the ownership, possession and control of which was necessary to constitute it such a system or carrier within the language and intent of the Act of Congress of August 29, 1916, or of the said proclamation, or of any other Act of Congress or proclamation relating to this matter.

It is for this reason no doubt that possession of it was never taken and control of it was never assumed by the Director General of Railroads. Its name is not included in the list of 165 carriers or systems of transportation which were taken over by him and which is referred to by this Court in the case of *Missouri Pacific Railroad Co. vs. Ault,* 256 U. S., —— (U. S. R. R. Admr. Bulletin, No. 4, pp. 198-200-221). These facts are distinctly stated by the petitioner in its brief filed in support of its petition for certiorari as follows: "There is no relationship of any kind whatsoever between the petitioner and the Director General of Railroads. Your petitioner is not named as one of the roads taken over for government operation during the war period. So far as these parties are concerned it is not known to the Federal government. *None of its properties were taken from it* because its properties at the time were in possession and control of its lessee, the Southern Railway Company" (page 35). There would seem, therefore, to be no room for contention either as to the accu-

racy or the pertinency of the facts establishing the status of the North Carolina Railroad at the times just mentioned.

Brief of the Argument

The record in this case shows that Respondent (hereinafter called plaintiff), a citizen and resident of North Carolina, sued the Petitioner (hereinafter called defendant), a corporation chartered by that State, upon a cause of action arising there. The cause proceeded regularly to trial, first in the Superior Court and then in the Supreme Court, and resulted in a verdict and judgment for five thousand dollars in favor of the plaintiff. The defendant in this proceeding asks this Court to review the action of the State Court and to reverse this judgment because, as it contends, the said judgment is erroneous and because it wrongfully deprives defendant of a right, privilege and immunity conferred upon it by the Federal Control Act of March 21, 1918. It is submitted that it is incumbent upon the defendant to maintain both branches of this contention in order to entitle it to a reversal in this Court of the judgment of which it complains. Even if the State Court had rendered a judgment against it which this Court might consider erroneous it could not upon that ground alone successfully invoke the jurisdiction of this Court to correct that error, nothing else appearing. The pertinent inquiry here would seem to be, not whether the judgment complained of was erroneous, but whether or not this record shows that

the defendant has thereby been wrongfully deprived of some right, privilege, or immunity to which it is entitled under the Act of Congress invoked by it, and which was seasonably and properly set up and claimed by it in the State Court.

Judicial Code, Section 237.

We respectfully contend that the record shows no such error.

The Point Presented for Decision by the Record in This Case

It is alleged in the complaint (Record, page 2) that the death of plaintiff's intestate was caused * * * by the negligence of the lessee of the defendant (the Southern Railway Co.). The answer to this allegation is a general denial (Record, page 3).

The only reference to the Director General of Railroads in the pleadings is the following (Record, page 3): "That the said railway (Southern Railway Co.) was being operated, maintained and controlled at the time mentioned by Walker D. Hines, Director General of Railroads, by virtue of the Acts of Congress of the United States and the orders of the President of the United States." This is in answer to the allegation in paragraph two of the Complaint (Record, page 1), that at the time of the death of plaintiff's intestate the Southern Railway Co. was operating the roadbed upon which it occurred, that is to say, the roadbed, the title to which, subject to a ninety-nine year lease, was in the North Carolina Railroad Co. Upon an

issue submitted to the jury they found that plaintiff's intestate was killed by the negligence of the defendant and assessed damages in the sum of five thousand dollars. There was judgment accordingly, and defendant appealed to the Supreme Court of the State, which affirmed the judgment *per curiam,* and without any written opinion.

During the trial in the Superior Court the defendant reserved the following exceptions:

(1) To the refusal of the Court to give the following instruction requested by it:

> "The evidence in this case showing that at the time of the injury to plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Co., but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of the said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and was not a party defendant in this action the jury should answer the first issue No." That issue was as follows:
>
> "1st. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?"

(2) To the giving by the Court of the following instruction (Record, page 6):

> "This action is brought by the plaintiff, gentlemen of the jury, against the North

Carolina Railroad Company, and it is admitted, gentlemen of the jury, that the North Carolina Railroad Company is a corporation and that prior to the time of this grievance had been leased by the defendant company to the Southern Railway Company and the defendant alleges, gentlemen of the jury, and contends that you should find from this evidence that prior to the time of this injury the United States Government had taken over this road and was at the time of the accident operating it as a war measure. The law says, gentlemen, that a railroad company, such as the North Carolina Railroad Company is, can not lease its road and relieve itself of responsibility, but that it is responsible for the conduct of its lessee, in this case the Southern Railway Company. And the law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee, and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it."

(3) To the signing of the judgment. It will be observed that there was presented to the Supreme Court of North Carolina only one assignment of error, the first (Record, pp. 6 and 7).

The second so-called assignment of error does not embody or announce any principle of law (Record, pp. 6 and 7).

The third assignment of error is merely formal

(Record, page 7). The second exception as taken is not assigned as error (Record, page 6), and was therefore abandoned in the Supreme Court of North Carolina. This is settled practice in that Court.

Carter vs. Reeves. 167 N. C., 132.

It seems also to be settled that where it is claimed, as here, that some right, privilege or immunity conferred upon defendant by an act of Congress has been infringed by a proceeding in a State Court, such right, privilege or immunity must have been seasonably and properly set up or claimed in the State Court.

Chicago & Northwestern Co. vs. Chicago, 164 U. S., 454.
Bolin vs. Nebraska, 176 U. S., 91.
Erie R. R. Co. vs. Purdy, 184 U. S., 148.

It is submitted that this means that such right, privilege or immunity must have been claimed and set up in accordance with the orderly and settled practice in the State Court.

By the application of this rule to the second exception (Record, page 6), which was not assigned as error in the State Court, and to the second alleged assignment of error (Record, page 7), which does not declare any legal principle, both would seem to be eliminated from consideration here. There is left then only the first exception and the first assignment of error which have been hereinbefore set out.

Did the Refusal of the State Court to Give This Instruction Constitute Error, and Such Error as Deprived Defendant of Some Right, Privilege or Immunity Conferred Upon It by the Federal Control Act.

(*a*) We submit that there was no error in the refusal to give said instruction. The *railroad properties* therein referred to were not the properties of the defendant. They were the properties not of the defendant, but of the Southern Railway Co. If this request contained an assumption or assertion that such properties belonged to defendant then such assumption or assertion was notoriously contrary to the facts, contrary to the facts admitted in this court in defendant's brief, heretofore cited, and this would have justified the action of the Court in refusing to give it. The only meaning consistent with the well-known and admitted facts which could have been put upon the words *railroad properties* was railroad properties of the Southern Railway Co. So reading these words there would seem to be no error in refusing to give the instruction and certainly no error of which the defendant can here complain, as such refusal affected only the status and the liability of the North Carolina Railroad Co., which was not and never has been under Federal control and not that of the Southern Railway Co.

It has been held for many years in North Carolina that the North Carolina Railroad Company is liable in such an action as this for damages arising from the negligence of the Southern Railway Co.,

its lessee, and this although the management, operation and control of the North Carolina Railroad was at the time of the tort complained of, exclusively vested in the Southern Railway Co., its lessee.

> *Logan vs. N. C. R. R.*, 116 N. C., 940 (decided in 1895).

This decision proceeds upon general principles of law. It has been acquiesced in for many years and has been reaffirmed in many subsequent cases and has never been thought to involve any Federal question.

The Court, in the ruling complained of, in effect refused to hold that this rule of law was changed by reason of the fact that the Southern Railway Co. system was under Federal control at the time this cause of action arose.

This ruling would seem no more to involve a Federal question than did the decision in the Logan case. Certainly there would not seem to be involved in said ruling any Federal question arising under the Federal Control Act, which is here invoked by the defendant, for the reason that it affected only the liability of the defendant which was not a carrier or system of transportation within the provisions of said act and never has been under Federal control.

It will be observed that the correctness and validity of the principles of law under which this defendant in the Logan case and the long line of cases

following it, was held liable is not drawn in question upon this record.

The defendant in its brief contents itself with citing and relying upon the Ault case as decisive of the instant case upon this point. The facts in the Ault case which this Court held exempted the Missouri Pacific Railroad Co. from liability to suit in the Arkansas court, upon the ordinary principles of common law, are materially different from the facts disclosed by this record upon which defendant relies to exempt it from a similar liability in the courts of North Carolina, and the principles of law applicable to that case do not, as we contend, apply to or control the instant case.

The Court held in that case that the Missouri Pacific Railway Co. was not answerable to the plaintiff in the State Court if the ordinary principles of common law liability were to be applied. The reason assigned was that said railroad company was a system of transportation within the meaning of the Federal Control act and as such had been taken over, pursuant to that act and the proclamation of the President, by the Director General of Railroads, and had been completely separated from the control and management of its system, that is, the physical properties of which it had been in possession and control up to the time of said enactment and which constituted it a system of transportation within the meaning of the act.

The Court says: "It is obvious that no liability arising out of the operation of these systems was

imposed by the common law upon the owner companies as their interest in and control over the systems was completely suspended," that is to say, suspended by the Federal Control act.

It can not justly be claimed, we think, that defendant here occupies a position at all analagous to that of the Missouri Pacific Railroad. None of the considerations which moved this Court to hold that company exempt upon common law principles when sued in the State Court are presented in this case. The North Carolina Railroad Company was not at the time Federal control went into effect a carrier or system of transportation within the language and intent of the Act of Congress and as defined by this Court in the Ault case. It was not by said act separated from the control and management of its system, that is, its physical properties and equipment, because, as has been shown, it then had no such properties and had not had for many years. The Director General of Railroads never took posession or assumed control of it. As defendant says in its brief: "There is no relationship of any kind whatsoever between your petitioner and the Director General. * * * None of its properties were taken from it because its properties at the time were in the possession and control of its lessee (Brief, page 35).

We therefore submit that the Ault case is not an authority for the position that the North Carolina Railroad Co. was not suable in the State Courts upon the ordinary principles of common law liability as that court might expound and apply those

principles just as in the case of any other resident and citizen of that State of which its courts had jurisdiction. These principles as declared and applied by that Court ever since 1895, when *Logan vs. N. C. Railroad Co.* was decided, fixed the defendant with liability in this case and necessarily resulted in the judgment against it. Plaintiff here does not base its right to sue the defendant in the State Court, upon any construction of the Federal Control Act, as plaintiff in the Ault case did, but upon ordinary principles of common law as declared and expounded by the Supreme Court of North Carolina; and it is submitted there is nothing in the Ault case which exempts a defendant situated as this defendant was from liability to such a suit, and further, that this Court will not interfere with the judgment thus obtained unless it operates to deprive the defendant of some right, privilege or immunity conferred upon it by the Act of Congress which it had invoked.

(*b*) *Did the Ruling Complained of as Erroneous Deprive the Defendant of any Right, Privilege or Immunity Conferred upon it by the Federal Control Act?*

This statute is construed in the Ault case and as there construed, the defendant would not seem to be within its provisions, and consequently it would seem that said act conferred upon defendant no right, privilege or immunity.

If the act did not embrace or include defendant within its provisions, no construction of said act

could reasonably be said to have deprived it of any right, privilege or immunity. It could not be deprived of what it never possessed.

In the opinion of this Court above referred to, it is said: " Here the term *carriers* was used as it is understood in common speech, meaning the transportation systems as distinguished from the *corporations* owning or operating them. Congress had, in section one, declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head, but he took them over as entities and they were always dealt with as such." Again: "It is this conception of a transportation system as an entity which dominates section ten of the act. The systems are regarded much as ships are regarded in admiralty."

While the defendant is a railroad corporation, an artificial being existing by virtue of the Act of the Legislature of North Carolina, and while it maintains, for some purposes, a corporate organization, as has been stated, it will be seen that in the opinion just cited a distinction is drawn between the *corporation* as such and the *carrier* or *system of transportation* mentioned in the Act of Congress. It has been shown also that at the time of the enactment of this statute no physical properties or equipment of the defendant were taken over by the Director General of Railroads, indeed, it had no such property and had not had since 1871. It was not, therefore, a system or transportation or carrier within the language or intent of the Act

of Congress and proclamation of the President pursuant thereto. It was never as a matter of fact, taken over by the Director General, as has been stated.

We respectfully contend, therefore, that it appears that the defendant is not included or embraced within the language or intent of the Act of Congress which it invokes and that, as that act conferred no right, privilege or immunity upon it, defendant can not claim that any construction of that act deprived it of any such right, privilege or immunity, and can not consequently claim here that the Supreme Court of North Carolina erred in refusing to hold it immune from suit in the State Court by reason of the provisions of the said Act of Congress.

Conclusion

Counsel for defendant in their brief (page 34) call attention of the Court to what they are pleased to say is the anomalous position of plaintiff, if this judgment should be affirmed. They there say: "He (she) would have, to all intents and purposes, a judgment against the North Carolina Railroad Co. which he (she) would be powerless to enforce by reason of the provisions of the Transportation Act."

If any anomaly exists it is submitted that it is found in such a statement as this. If this plaintiff is fortunate enough to have this judgment affirmed by this Court she believes it will be paid; she believes that the respect which is due and which

is universally conceded to the judgments of this Court will secure its payment. Since counsel has seen fit to make such a statement as this, at such a time and place, in regard to the satisfaction of a judgment which this court may see fit to affirm, it may be said that it is a well-known fact that this defendant has in Alamance County, North Carolina, real property which was never included in the lease either to the Richmond & Danville Railroad Company or to the Southern Raiway Co. valued at many times the amount of this judgment, and which is liable to its satisfaction if after affirmance by this Court, its payment elsewhere should be refused. It is respectfully submitted that the judgment of the Supreme Court of North Carolina should be affirmed.

JOHN A. BARRINGER,
R. C. STRUDWICK,
Counsel for Evelyn K. Lee, Admx.,
Respondent.

Greensboro, N. C., Feb. 21, 1922.

No. 7[redacted]2[redacted]38

Supreme Court of United States

NORTH CAROLINA RAILROAD COMPANY

PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Brief in behalf of Respondent.

J. A. BARRINGER,
R. C. STRUDWICK.

Counsel for Respondent.

HARRISON PRINTING CO., GREENSBORO, N. C.

BRIEF

In Behalf of Respondent

The line of railway upon which intestate was killed was a art of the North Carolina Railroad, which was in 1895, leased the Southern Railway Company for 99 years, and has nce then been operated by it. By a long line of decisions eginning with Logan vs. R. R. 116 N. C., 940 (1895) it has een settled in North Carolina, that the lessor road (the pe- tioner) is liable in damages for injuries arising from the egligence of its lessee.

The Complaint in this action was in the usual form asking amages against the petitioner for the negligent killing of her usband, a conductor, by the Southern Railway Company. he answer denied the acts of negligence charged, admitted the wnership of the Road by petitioner, and its lease to the South- rn, and alleged "that said railway was being operated and aintained and controlled at the time mentioned (March, 1919) y the Government of the United States through Walker D. ines, Director General of Railroads by virtue of the Acts of ongress of the United States and the orders of the President the United States."

The prayer of the answer was as follows: "Wherefore he defendant North Carolina Railroad Company prays that id action be dismissed."

There is no reference in the answer to any claim of pri- ilege, right or immunity of or by [redacted] under the Federal onstitution or any Act of Congress unless the quotation om the answer **Supra**, can be construed to be such.

Petitioner

That it cannot be so construed seems to be held in the fol- wing cases:

F. G. Oxley Co., vs. Butler, 166 U. S., 646. Dewey vs. esIloines 173 U. S., 193. Capital City Dairy Co., vs. Ohio, 33, U. S., 238. Bolin vs. Nebraska, 176, U. S., 83. Nor any such claim made in the instructions requested by peti- oner on the trial.

See Petition for Certiorari p. 4.

There is only an incidental reference to any Constitutional ght of petitioner in its brief filed in the Supreme Court,

to-wit: "To take its property in payment of this judgment would be to take its property without due process of law."

This is not claiming a right under the Constitution of the United States. That Constitution is not mentioned. Such language is insufficient to raise any Federal question.

The Constitution of North Carolina Article 1. 17 forbids such an Act, and for aught that appears the claim was under that Constitution. Kipley vs. Illinois, 170, U. S., 182.

The only objection made before the trial Court, relating to this matter, was, as has been stated to the non-joinder of the Director General as a party defendant; that is, to a defect of parties. This is an implied admission that the action was well brought if the Director General had been made a Co-defendant. This is not a claim of immunty right or privilege by petitioner," it seems rather an implied admission of a joint liability. The Director General never applied to be made a party. There was a verdict and judgment in favor of respondent for $5000. Upon appeal to the State Supreme this judgment was affirmed by a **per Curiam** order; and in so donig it does not appear that Court did anything more than to decline to pass upon the objection made in the trial Court, because it was not raised in the manner required by the State practice. This requires that such an objection, a defect of parties, shall be raised by demurrer and not by answer as the petitioner attempted to do, when it appears, as here, upon the face of the record. The State Statute is mandatory upon this point. Rev: 1905 474(4). C. S. 511 (4). It further provides that unless raised by demurrer, such an objection is waived Rev. 1905 478. C. S. 518.

In Rosenbecker vs. Martin 170 N. C., 237 (1915) the Court says "The defect of parties, if there was one, appeared upon the face of the record and objection should have been taken by demurrer in the beginning. Revisal 474 (4).Davidson vs. Elms, 67, N. C., 228.

Machine Co., vs. Liumber Co. 109, N. C., 576. A defendant cannot demur and answer at the same time. By answering to the merits all defects are waived, except an objection to the jurisdiction of the Court or to the defectiveness of the Cause of Action." This objection not having been raised in the trial Court in the manner required by Statute and the decisions of the Court, that Court upon this ground, if no other was correct in affirming the judgment, regardless of what its decision might have been, or ought to have been if the

points had been raised and presented according to law, in the trial Court.

This point was presented and insisted upon by respondent on the appeal. This appears from the excerpt from her brief attached hereto as "Exhibit A."

It is settled practice in North Carolina that only those points properly raised and presented to the trial Court will be considered on appeal. Sutton vs. Walters, 118, N. C., 495, (502). Meekins vs. Tatum, 79, N. C., 546.

Even, therefore, if it be held that this record discloses any claim of a Federal right ,privilege or immunity, still it further appears therefrom that such right, privilege or immunity was never properly and in accordance with the State practice, presentedin either in the trial Court or to the Supreme Court, and that the judgment of Supreme Court did not necessarily involve a decision of such right, privilege or immunity. It cannot therefore be contended, that the judgment of the Supreme Court denied to petitioner any such right, privilege or immunity, so as to confer jurisdiction upon this Court, to review its judgment by Certiorari.

The right, privilege or immunity claimed, arises, if at all, under the third section of the Act of Congress. R. S., U. S., 709, Judicial Code 237.

This seems to be the contention of petitioner as to the Federal question attempted to be presented. (Petitioners brief, p 14). Whether a right or privilege claimed under the Constitution or an Act of Congress was distinctly and sufficiently pleaded and brought to the notice of the State Court is itself a Federal question, upon which this Court can and will pass. This Court has held that where the case arises under the third clause of the jurisdictional Statute, the right title immunity or privilege must be specially set up or claimed. Chicago & N.W., Co., vs. Chicago, 164 U.S. 454. Schuyler Nat'l Bank vs. Bullong 150 U. S., 85. Bolin vs .Nebraska 176, U. S., 83especially at p. 91. Telluride Power Co., vs. Rio Grande Co., 175 U. S., 639, at p. 647.

This Court in Erie R. R. vs. Purdy 184, U. S., 148 held that where a party asserting that the final judgment of the highest Court of a State denied to him a right or immunity under the Constitution of the U. S., did not raise such questions or specially set up or claim such rights or immunity in the trial Court, thisCourt cannot review such final judgment and hold that the right or immunity so claimed had been denied by the highest Court of the State, if that Court did nothing

more than decline to pass upon the Federal question because not raised in the trial Court as required by State practice."

The right, privilege or immunity claimed must be set up or claimed in the trial Court whenever, under the State practice the highest Court of the State, in reviewing the judgment of the trial Court refuses to consider questions not therein raised. Baldwin vs. Kansas 129, U. S., 152. Spies vs. Illinois, 123 U. S., 131. Hulbert vs. Chicago, 202, U. S., 281.

The per curiam order of the Supreme Court affirming the judgment of the trial Court, is entirely consistent with the idea that the objection of the non-joinder of the Director General was not properly made in the trial Court, and that under the State practice this objection was not presented in the record before it.

Brown vs Massachusetts 144, U. S., 573.

We therefore contend:

(1) That the objections raised in the trial Court did not constitute a claim of Federal right, privilege or immunity of the petitioner or by the petitioner.

(2) That if they did, such claim was never, and in accordance with State practice presented to the trial Court.

(3) That no such claim was presented in petitioner's brief in the Supreme Court of North Carolina.

(4) That the per curiam order of the Supreme Court of North Carolina, affirming the judgment did not necessarily or at all involve a denial of such claim. right privilege or immunity. It is respectfully submitted that the petition for a writ of cerliorari should be denied.

JOHN A. BARRINGER
R. C. STRUDWICK
Counsel for Respondent.

March 5, 1921.

EXHIBIT A.

No. 389 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

EVELYN LEE vs. N. C. R. R. CO.

PLAINTIFF'S BRIEF

The only exception urged in behalf of appellant is that the Director General of Railroads was not made a party.

This objection, if it had any validity, can not be raised in the manner attempted here. Revisal 474 (4) 478.

If there was a defect of parties the defendant waived it by failure to demur; and it could raise this objection in no other way.

No. [redacted]2[redacted]33

Supreme Court of the United States

OCTOBER TERM, 1920

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT.

Reply Brief of Petitioner to Brief of Respondent.

S. R. PRINCE,
H. O'B. COOPER,
JOHN W. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

No. 758.

Supreme Court of the United States

OCTOBER TERM, 1920

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT.

Reply Brief of Petitioner to Brief of Respondent.

The brief filed in this cause on behalf of respondent advances two reasons why the petition for the writ of certiorari should not be granted.

First: That the only objection made by the petitioner before the trial court that judgment should not be rendered against it was that there had been a non-joinder of parties, as to which no proper objection had been filed in that court; and

Second: That the record does not disclose any claim by the Petitioner of a Federal right, privilege or immunity.

No Claim of Non-joinder of Parties.

An examination of the printed record filed in this cause will clearly refute the claim of respondent that the only exception made by petitioner in the trial court was that the Director General had not been made a co-defendant. There was in effect really only one exception taken, and that was that the property of the Petitioner having been taken from it against its will and being operated and controlled at the time the cause of action arose under and by virtue of the act of Congress and the order of the President of the United States, there could be no recovery against it.

The first exception was for the refusal of the court to give an instruction that:

> "The evidence in this cause showing that at the time of the injury to plaintiff's intestate, which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action—"

the jury should find for the petitioner. (Printed record, page 9.)

The second exception was to the action of the trial court in giving, instead of the charge requested in Exception No. 1, an instruction in part as follows:

> "The law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee; and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it." (Printed record, page 10.)

The third exception was to the signing of the judgment in the cause. (Printed record, page 10.)

There were no other exceptions taken and there was consequently nothing further before the Supreme Court of North Carolina than that which is involved in these exceptions. There is not one word in the record before this court to sustain the statement made by counsel for respondent in their brief (page 2) that:

> "The only objection made before the trial court, relating to this matter, was, as has been stated, to the non-joinder of the Director General as a party defendant; that is, to a defect of parties."

So that the first point which is argued to some extent in the brief of respondent is entirely beside

the record, and it is deemed unnecessary to make any further reply to the same other than as above set out.

Right Under Act of Congress Specifically Set Up in Record.

The second and other argument contained in respondent's brief is that the petitioner did not claim any Federal right, privilege or immunity in that such was not presented or set up in the trial court or the Supreme Court of North Carolina.

In its answer filed in the trial court petitioner, after denying all allegations in the complaint other than the fact that it was a corporation in the State of North Carolina, owning the railroad where the accident occurred, which had been leased by it to the Southern Railway Company, distinctly averred:

> "* * * The facts being that said railway was being operated, maintained and controlled at the time mentioned by the Government of the United States by and through Walker D. Hines, Director General of Railroads, by virtue of the acts of Congress of the United States and the orders of the President of the United States." (Printed record, page 6.)

Here is a distinct and clear allegation that the Petitioner's properties were in the hands of the United States Government under an Act of

Congress and an order of the President of the United States. There can be do doubt whatever that this allegation put the court on notice that by reason of the said act and said proclamation the petitioner claimed it was not liable for the cause of action sued upon. It is true that the act was not specifically named, but it is equally true that the courts are charged with judicial notice of such acts and such proclamations, and there was but one Act of Congress and one proclamation dealing with the subject.

Armstrong vs. U. S., 80 U. S., 154.
Jenkins vs. Collard, 145 U. S., 546.
Caha vs. U. S., 152 U. S., 211.
Spokane, etc., R. Co., vs. Tieler, 167 U. S., 65.
Cosmos Company vs. Gray Eagle Company, 190 U. S., 301.
Brown vs. Colo., 106 U. S., 96.
15 Ruling Case Law, 1064.

Notwithstanding the distinct allegation that the petitioner's properties were in the hands of the Government under the act of Congress and the order of the President of the United States, and the prayer of the petitioner that by reason thereof the action should be dismissed (printed record, page 6), the trial court entered judgment against it, which is the basis of exception number three. (Printed record, page 10.)

Although the judgment of the lower court was affirmed by the Supreme Court of North Carolina *per curiam*, there can be no speculation as to what

was involved in that decision. As stated, *supra,* the exceptions filed in the cause, which were before the Supreme Court of North Carolina, in effect related to but a single question: viz., is the petitioner, the corporate owner of a railroad system, liable in damages on a claim arising out of the operation of said railroad by the United States Government under and by virtue of an act by Congress and an order of the President of the United States made pursuant thereto?

Although the Supreme Court of North Carolina handed down no written opinion and gave no reasons for its action, yet its affirmance of the lower court's judgment necessarily involved a right or immunity claimed by your petitioner under the act of Congress, because that was the sole question before the court.

As was said by this court, in the early case of *Parmelee vs. Lawrence,* 11 Wall., 38:

> "It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it."

In our case the question appears in the answer filed, and under the exceptions taken the State court necessarily decided the question raised thereby.

Also in *Haire vs. Rice,* 204 U. S., 291, 299:

> "The decision of both questions, as the court determined them, was essential to the judgment rendered, and the decision of the second was a distinct denial of the Federal right claimed by the plaintiff in error. Where it clearly and unmistakably appears from the opinion of the State court under review that a Federal issue was assumed by the highest court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error. *San Jose Land & Water Company vs. San Jose Ranch Company,* 189 U. S., 177. Applying this rule to the case, there is jurisdiction to re-examine the claim of the plaintiff in error on its merits."

In this case as in that the decision of a Federal question was essential to the judgment rendered and is sufficient to give this court jurisdiction.

The respondent sets up as an exhibit to her brief in this court a quotation from her brief in the Supreme Court of North Carolina. While recognizing that the briefs filed in the State Supreme Court are no part of the record here, we feel justified in denying the assertion that the only exception that was urged there was a non-joinder of the Director General as a party, by quoting from petitioner's brief in that court, where it was said:

> "The properties of the Railroad Com-

pany, without its consent, had been taken over by the Government of the United States and were being operated and controlled by Government agencies, the North Carolina Railroad having no contractual relations with these agencies. To take its property in payment of this judgment would be to take its property without due process of law. Only such judgments as are rendered in accordance with the Act of Congress passed March 21, 1918, could be collected out of funds provided by Congress to pay such judgments."

It is respectfully submitted that the writ of certiorari should be granted.

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

NORTH CAROLINA RAILROAD COMPANY *v.* LEE, ADMINISTRATRIX OF LEE

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 33. Argued October 6, 1922.—Decided October 16, 1922.

1. A railroad corporation whose line, while leased to another, was taken over by the Government under the Federal Control Act, cannot, consistently with that act, be held for personal injuries occasioned by an accident during federal control, under a local rule making lessor railroads liable for the negligence of their lessees. P. 17.
2. Under the Federal Control Act, the Government operates a railroad not as lessee, but under a right in the nature of eminent domain. P. 17. *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, followed.

Reversed.

CERTIORARI to review a judgment of the Supreme Court of North Carolina affirming a judgment against the present petitioner in an action for death by negligence.

Mr. S. R. Prince, with whom *Mr. H. O'B. Cooper*, *Mr. John N. Wilson* and *Mr. L. E. Jeffries* were on the briefs, for petitioner.

Mr. R. C. Strudwick, with whom *Mr. John A. Barringer* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Southern Railway includes a line in North Carolina which is held under a ninety-nine year lease. On that line an employee was killed in March, 1919—apparently while engaged in intrastate commerce. His administratrix brought, in a court of the State, this action for damages, alleging that the line was then being operated

by the Southern as lessee, and that the lessee's negligence in operation caused the injury. Only the lessor, the North Carolina Railroad Company, was made defendant. Its liability was asserted under a local rule by which a railroad corporation is liable for injuries resulting from a lessee's negligence in operation. *Logan* v. *North Carolina R. R. Co.*, 116 N. Car. 940. The defendant set up the fact that, at the time of the accident, the Southern system was being operated solely by the Director General of Railroads under the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451. On that ground it requested a ruling that the plaintiff could not recover. This request was refused; and the court instructed the jury that, if the Government was operating the railroad, it was doing so in the capacity of a lessee and that the defendant "would still be responsible for the acts and conduct of the Government at the time it was operating" the same. The verdict was for the plaintiff; and the judgment entered thereon was affirmed by the Supreme Court of North Carolina without opinion. This Court granted a writ of certiorari. 255 U. S. 567. Thereafter, the liability of carriers during federal control was considered in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554.

The Government operated this railroad not as lessee, but under a right in the nature of eminent domain. It operated through the Director General, not through the Southern Company as agent. The *Ault Case* holds that the Director General alone was made subject, by § 10 of the Federal Control Act, to the "liabilities as common carriers, whether arising under State or Federal laws or at common law." To permit an action for injuries suffered during federal control to be brought either against the Southern Company as lessee, or against the North Carolina Company as lessor, would be inconsistent with the provisions of that act. This is now recognized by the

Supreme Court of North Carolina. *Lane* v. *Southern Ry. Co.*, 182 N. Car. 774; *Barbee* v. *North Carolina R. R. Co.*, 182 N. Car. 775.

Reversed.